Alternative Dispute Resolution in the Federal Court
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In Harper Lee's book *To Kill a Mockingbird*, her character, Atticus Finch, delivers a courtroom speech that articulates the paradigm for our judicial system. In his closing argument to the jury Atticus says:

> "[T]here is one way in this country in which all men are created equal– there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. . . . Our courts have their faults, as does any human institution, but in this country, our courts are the great levelers, and in our courts all men are created equal."[1]

In the federal courts, we are working to achieve equal access to justice, and in this time of increasing litigation costs and crowded court dockets, the Court is using alternative dispute resolution as a way for parties to resolve their conflicts within the parameters of the court system, but outside of a courtroom. As all litigators and their clients know, there is a limit to the remedies that can be afforded through a trial. The alternative dispute resolution arena can provide creative problem-solving opportunities that often more effectively fit the needs of the parties, thereby expanding the way in which the courts can act as a leveler for all types of litigants.

Developments in the District of Idaho ADR Program

The federal court's ADR program includes (1) mediation; (2) arbitration; and (3) judicially supervised settlement conferences. Mediation is available for bankruptcy and civil cases. During 2004 the Court also implemented pilot programs for early mediation conferences and a settlement week for pro se cases.

Parties may select from the Court's panel of forty-two private mediators or they may request a mediation with a visiting district court judge. The private mediators have gone through an application process with the Court in order to be included on the panel. Private mediators are paid directly by the parties. The Mediator Roster is found at www.id.uscourts.gov under the "Court Information" category.

The Court has also referred parties to mediation with United States District Judges David Carter, William Shubb, and Bernard Friedman. Ninth Circuit Court of Appeals Judge T.G. Nelson has also acted as a mediator for civil cases.

From the inception of the Court's ADR Program in 1996 until October of 2002, a total of sixty-two (62) civil cases were referred to mediation. During 2003, ninety-seven (97) cases were referred to mediation. Thus far in 2004, one-hundred fifty-six (156) cases have been referred to mediation. The Court's current success rate with cases referred to mediation is approximately 64%.

Over the past three years, only three cases utilized arbitration as an ADR option. The cases involved technical scientific issues, and the arbitrators had the necessary expertise to resolve the claims. For example, one case involved a metallurgical manufacturing claim, and the arbitrator was a retired judge who held a master's degree in metallurgical engineering. The Court's roster of private arbitrators is found at www.id.uscourts.gov under the "Court Information" category.

The Court has a mediation conference room in which we are able to host mediation sessions with private mediators. We have seen many successful mediation sessions here at the Court. One example involved a case with numerous self-represented litigants and the U.S. Attorney's office. The mediator was observed shuttling between caucus sessions involving different configurations of Plaintiffs and Defendants. After a long day, the parties came to a creative resolution of a long-standing dispute among various landowners. Other examples include pro se litigants whose cases are resolved once they hear an explanation of the applicable law in their case, and feel that their concerns have been accurately heard by the mediator and the opposing party.

With one-third of the civil cases in the Court consisting of pro se filings, the use of ADR in resolving these disputes has proven helpful in assisting parties to take responsibility for resolving their conflicts. If the parties cannot afford to pay mediators, they may request a mediator from the pro bono mediation roster. The Court attempts to locate and appoint counsel for the limited purpose of attending the mediation session with the pro se litigant. The success rate of the mediation sessions in the pro se cases has been over 70%.

Procedures Specific to Each Judge

Each Judge in the District of Idaho follows a specific procedure for selecting ADR options. If your case is before Chief Judge B. Lynn Winmill, the parties will be asked to submit an ADR plan by a specific deadline. The ADR plan should include the ADR option the parties have chosen, the ADR provider, and the date by which the option

will be completed. Failure to timely file an ADR plan will result in an ADR conference at which the attorneys and their clients must appear in person to review ADR options with the Court.

District Court Judge Edward J. Lodge is currently including an order to participate in mediation as part of his civil case scheduling order. An ADR discovery deadline is provided, along with a mediation deadline. The mediation deadline is typically set before the regular discovery cut-off date for the case. Parties may be relieved of the mediation deadline upon a showing of good cause. For example, if there is a discrete legal issue which needs to be decided prior to a productive mediation session being held, the Court will consider extending the mediation deadline. After completion of the ADR process, the parties must submit a status report regarding their settlement attempts.

Chief United States Magistrate Judge Larry M. Boyle also requires parties to designate an ADR option in their civil litigation plans. Magistrate Judge Boyle then issues a scheduling order, setting forth the parties' ADR choice. Magistrate Judge Mikel Williams requires the parties to discuss the ADR options available in our Court prior to filing their litigation plan. They may designate their selection on the stipulated litigation plan.

After the parties complete mediation, Local Civil Rule 16.5 requires that a status report be submitted to the ADR Administrator. Statistics are compiled regarding the success of the mediated cases.

Many litigants take advantage of the judicially supervised settlement conferences available with the Magistrate Judges in our District. Settlement Conferences are governed by Local Civil Rule 16.4. After the close of discovery and the disclosure of expert witnesses, the parties are required to meet and discuss the possibility of settlement. If they determine that a settlement conference would be beneficial in resolving the claims, the parties may request referral to either Judge Boyle or Judge Williams. The Magistrate Judges schedule their own settlement conferences, and counsel may contact their courtroom deputies in order to set a conference date.

Confidentiality and Privilege in Federal Court

A topic of concern among those who participate in mediation is the extent to which the mediation proceedings are protected by confidentiality and privilege. The Ninth Circuit case of *National Labor Relations Board v. Macaluso, Inc.*[2] held that the public interest in maintaining the impartiality of federal mediators outweighs the benefits of having every person's evidence before the court. "[I]f conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their

activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side."[3]

Based on the foregoing case law, the District of Idaho's Local Civil Rule 16.5 states that "all communications made in connection with any ADR proceeding under this local rule shall be privileged and confidential." Those who participate in mediation in federal court cases may invoke the rule in order to prevent disclosure of communications made during the course of mediation.

Education and Training

The Ninth Circuit Court of Appeals ADR Committee has received access to grant money, providing for district court training programs. Several different training session models will be created, and local district courts may access the training programs for their district conferences. We anticipate using the training models for our regional district conferences in 2005. We are also planning to sponsor a training session for the mediators on our Court panel during the upcoming year.

Conclusion

The ADR Program in the District of Idaho has experienced significant growth over the past two years. The civil litigants in federal court are becoming accustomed to the use of ADR as a way to resolve their conflicts, and their attorneys are capably representing them in mediations, arbitrations, and settlement conferences. We are appreciative of counsels' response to and assistance with the Court's ADR Program, and we welcome any suggestions for change and improvement in our program. It is the hope of the Judges and Court staff that the use of ADR will expand litigants' access to the federal court in Idaho, whether the party is a large corporation or an indigent pro se plaintiff.

Endnotes

1. Harper Lee, To Kill a Mockingbird 188 (Lippincott 1960).

2. 618 F.2d 51, 54 (9th Cir. 1980).

3. *Id*. at 55; *see also Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998)(denying a party's request to compel production of the mediation brief and communications during mediation); *B. Sheldone v. Pennsylvania Turnpike Commission*, 104 F. Supp. 2d 511, 512 (W.D. Penn. 2000)(analyzing the factors necessary to establish a federal mediation privilege).